

Victoria Estates Convalescent Center (Victoria)
(also known as American Convalescent Center)

Issue

The questions presented are (1) whether a provider agreement is valid for purposes of FFP when it is entered into pursuant to a State court order directing the State to retroactively reinstate the facility as a certified provider and continue payments pending a hearing on whether the State was correct in decertifying the facility, and (2) whether a provider agreement is valid when certification is based on a plan of correction (POC) which is disapproved by the State survey agency.

Facts

In February 1976, and on July 7-8, and July 19-22, 1976, the State conducted surveys of Victoria and noted deficiencies. (See Agency response dated July 11, 1979, hereafter referred to as "Agency Response," Exhibit 1.) On or about August 26, 1976, the State notified Victoria that it was not in compliance with standards for skilled nursing facility (SNF) and intermediate care facility (ICF) services and that its provider agreement would not be renewed on October 1, 1976. (See State's Request for Reconsideration, hereafter "State's Appeal," dated April 4, 1979, p. 3, and Exhibit C.)

On November 24, 1976, Victoria filed suit in the Circuit Court of Cole County, Missouri, and the Court issued an Order to Show Cause and Temporary Restraining Order requiring the State to retroactively reinstate Victoria as a certified provider from November 1, 1976, to enter into a temporary provider agreement with Victoria, to make payment to Victoria retroactively from November 1, 1976, and to refrain from enforcing its previous recommendation of decertification. (State's Appeal, dated April 4, 1979, Exhibit D.) The Court subsequently issued an amended Order to Show Cause and Temporary Restraining Order on December 28, 1976, which continued the Order entered on November 24, and further ordered the State to continue Victoria's status as a certified provider as it existed on August 20, 1976. (State's Appeal, April 4, 1979, Exhibit E.)

On December 29, 1976, the Division of Health (DH or State survey agency) issued a Certification and Transmittal form (C&T) certifying Victoria for ICF and SNF services. There is no indication in the record that the certification was based on a new survey, and the C&T form itself states that the certification was being made pursuant to the court order. (Agency Response, Exhibit 5.) The Division of Family Services (DFS or single State agency) and Victoria entered into a provider agreement on December 30, 1976. The agreement shows an effective date of November 1, 1976 and states on its face that it should terminate one year from the effective date of the agreement, or upon determination of the court case

in the State's favor, or upon determination of the State's motion to dismiss in the appellate court in the State's favor.^{1/} (State's Appeal, April 4, 1979, Exhibit F.)

A C&T dated June 3, 1977 notes that the facility was voluntarily withdrawing from the SNF program; no effective date for withdrawal is shown. (Agency Response, Exhibit 6.) By letter dated October 26, 1977, the Bureau of Nursing Home Licensing and Certification (apparently a branch of the State survey agency) informed the Administrator of Victoria that surveys conducted on October 18, 19, and 20, 1977 revealed deficiencies which prevented certification as a provider of ICF services. (Agency Response, Exhibits 7 and 8.)

On July 12, 13, and 14, 1978, the State again conducted a survey of Victoria and noted deficiencies. (Agency Response, Exhibit 12.) On July 19, 1978, DFS signed an ICF provider agreement with Victoria for the period July 1 through January 31, 1979. (Agency Response, Exhibit 10.) On July 28, 1978, DH certified Victoria as an ICF for the period July 25 through December 31, 1978 based on a plan of correction. (Agency Response, Exhibit 9.) On August 4, 1978, the administrator of Victoria signed the POC, and on August 11, 1978 DH disapproved the POC. (Agency Response, Exhibit 12.)

On September 6 and 7, 1978, Federal officials surveyed Victoria. (Agency Response, Exhibits 11 and 12.) By letter dated October 5, 1978, the Agency notified the State that there were differences between the findings of the State and Federal surveys and that the State findings alone should have precluded certification. (Agency Response, Exhibits 11 and 13.)

Discussion

The first question presented here is whether the court order is a basis on which the Agency is authorized to provide FFP, and, if so, for how long.

The Board dealt with similar questions in Ohio Department of Public Welfare, Decision No. 173, April 30, 1981. The Board concluded in that case that under MSA-PRG-11 (a Program Regulation Guide issued on December 20, 1971 by the Commissioner, Medical Services Administration, Social and Rehabilitation Service, the predecessor to HCFA) and 45 CFR 205.10(b)(3), FFP is available in the cost of covered services to Medicaid recipients in nursing homes with provider agreements that have been terminated (including cancelled) or have expired and not

^{1/} The State apparently received FFP for the period October 1 through October 31 for some reason not specified in the record.

been renewed, where a facility appeals the adverse determination and a State or Federal court orders the State to continue payments because of that appeal, thereby effectively continuing the provider agreement. The Board decided in Ohio that the Agency is authorized to reimburse the State the Federal matching share if the facility is not upheld on appeal, but the period of reimburseable services may not exceed 12 months from the termination or nonrenewal determination; except that if within the 12 months a State conducts an inspection of the facility and makes a new determination on certification, FFP may not be available beyond the date of that determination. See Ohio, p. 14.

The record in this case reveals that the facility's provider agreement expired on September 30, 1976; that the court order was entered on November 24, 1976 (amended on December 28) and required the State to make payments as of November 1, 1976; and that a determination on the next survey was made by letter dated October 26, 1977. Accordingly, following the Ohio decision the Agency should provide FFP for services at Victoria for the period of 11 months from November 1, 1976 through September 30, 1977. 2/

The next question is whether the provider agreement entered into on July 19, 1978 for the period July 1 through January 31, 1979 is valid for purposes of FFP.

Under 42 CFR 449.10(b)(15)(vi) (1977), the Federal government is authorized to make a determination as to whether a provider agreement should be considered valid evidence that a facility meets all pertinent Federal requirements for certification (substantially the same provision is found at 42 CFR 442.30 (1978), but 1977 regulation hereafter cited for convenience). If any one of the four failures on the part of a State survey agency listed in 42 CFR 449.10(b)(15)(vi) is established with respect to a particular Title XIX facility, the provider agreement is not accepted as evidence that the facility meets the standards.

One basis for finding that the provider agreement is not evidence of certification is the failure of the survey agency to "follow the rules and procedures for the certification of an intermediate care facility set forth under Section 449.33(a)(4)(ii)(B)." (42 CFR 449.10(b)(15)(vi)(B) (1977).) Section 449.33(a)(4)(ii)(B) allows certification of a facility which does not fully meet the required standards if "the facility provides in writing a plan of correction acceptable to the survey agency." The record shows that the facility was never in compliance with ICF standards and further that the C&T was based on a POC which was not acceptable to the State survey agency. Accordingly, we find that the survey agency should not have certified the facility without an acceptable POC and that the July 19, 1978 provider agreement is not evidence of proper certification.

2/ Continued FFP is based on the court order which required payments to the facility beginning November 1. Under Ohio, the maximum period for which FFP would be available begins with the period covered by the court order and ends 12 months after the expiration of the provider agreement.

Conclusion

Based on the foregoing, the Board concludes that HCFA should provide FFP to Victoria from November 1, 1976 to September 30, 1977. The Board upholds the disallowances for the remainder of the periods in question with respect to Victoria.

Hillhaven Convalescent Center (Hillhaven)

Issue

The questions presented are (1) whether the Agency must provide FFP under regulations allowing 30 days of additional FFP under certain conditions, but where the State presents no evidence that it complied with the conditions; and, (2) whether the Federal government must provide FFP where the State has denied the facility's request for a two-month extension of its provider agreement but a State court orders the State to continue Medicaid payments pending a hearing on whether the State should have granted a two-month extension of the provider agreement.

Facts

From August 10 to 13, 1976, the State conducted a survey of Hillhaven which revealed certain deficiencies. (Agency Response, Exhibit 17.) On September 24, 1976, the State signed a C&T indicating "non-certification" of Hillhaven as a provider of SNF and ICF services, effective October 31, 1976. (Agency Response, Exhibit 16.)

On November 3, 1976, DFS notified Hillhaven that due to continuing deficiencies, Hillhaven's Medicaid agreement with DFS would not be renewed on October 31, 1976. (Agency Response, Exhibit 25.) On or about November 26, 1976, Hillhaven requested that DFS grant a two-month extension of the Medicaid agreement, and on December 7, 1976 the State denied the request. (State's Appeal, April 4, 1979, p. 9, and Exhibits K, L, and M; and Agency Response, p. 20.)

Hillhaven appealed to the Circuit Court of Cole County, Missouri, the State's decertification as a provider of SNF and ICF services under Title XIX. On December 7, 1976, Hillhaven filed a Petition for Relief, and the Circuit Court of Cole County entered a Preliminary Writ of Prohibition commanding the State:

... to refrain from stopping the Medicaid payments to Hillhaven until further action by this court; and further, that on the 23rd day of December, 1976, you show cause before this Court why you should not be absolutely restrained from stopping said payments until you have provided an opportunity, by hearing and/or forum, for the presentation of evidence as stated above, have granted or denied the requested extension based upon the evidence presented, (State's Appeal, April 4, 1979, Exhibit K.)

On December 23, 1976, the Circuit Court entered an Amended Preliminary Writ of Prohibition which directed the State --

... to continue Hillhaven, Inc.'s status as a certified provider as such status existed on August 1, 1976, and ... to do all acts necessary for the continuance of said status. (State's Appeal, April 4, 1979, Exhibit L.)

Pursuant to the court orders, the State survey agency prepared a C&T which stated that the facility was certified effective December 1, 1976. The C&T did not show an ending date for the period of certification. (Agency Response, Exhibit 26.) On March 14, 1978, DFS, DH, and Hillhaven entered into a stipulation and agreement for dismissal of the court orders, which included as one of its provisions that the State, if necessary, grant Hillhaven --

... a two month extension, through December 1976, of the term of the Medicaid agreement (State's Appeal, April 4, 1979, Exhibit M.)

By two letters dated January 23, 1979 and one dated March 17, 1981, the Agency disallowed FFP for services at Hillhaven for the period November 1, 1976 through December 31, 1976.

The State has alleged that both DFS and HEW provided Hillhaven with an additional 30 days (through November 30, 1976) of Medicaid funding to facilitate the relocation of patients. (State's Appeal, April 4, 1979, p. 9.) The State presents no evidence to support this contention, and the Agency states that it has no evidence whether this additional funding was actually requested or allowed. (Agency Response, p. 19.)

The State also argues that the court orders overcome the usual limits on a two-month extension and establish the existence of a valid provider agreement for the period November 1, 1976 to December 31, 1976. The Agency argues that the court-ordered provider agreement, not based upon certification that the facility is in compliance with Medicaid standards, is not a valid provider agreement, and that without a valid provider agreement FFP is not available.

Discussion

In order for the State to obtain FFP for SNF or ICF services for eligible individuals for an additional 30 days in a facility whose provider agreement has expired or has been terminated, the State had to meet the requirements of the "30-day rule" allowing FFP

... only if such individuals were admitted to the facility before the date of expiration or other termination of its provider agreement, and if the State agency makes a showing satisfactory to the Secretary that it has made reasonable efforts to facilitate the orderly transfer of such individuals from such facility to another facility. (45 CFR 249.10(b)(4)(i)(E) and 45 CFR 249.10(b)(15)(v) (1976).)

The State has presented no evidence that it made any efforts to facilitate the orderly transfer of any patients in Hillhaven to other certified facilities, despite the fact that the lack of evidence was cited in the Board's February 11, 1981 Order as a potential basis for upholding the Agency. Therefore, FFP is not available under the 30-day rule for services provided by Hillhaven.

With respect to the two-month extension of Hillhaven's Medicaid agreement, the regulations in effect during the period in question provide:

... the single State agency may extend [the term of a provider agreement] for a period not exceeding two months where the survey agency has notified the single State agency in writing prior to the expiration of the provider agreement that the health and safety of the patients will not be jeopardized thereby, and that such extension is necessary to prevent irreparable harm to such facility or hardship to the individuals being furnished items or services or that it is impracticable within such provider agreement period to determine whether such facility is complying with the provisions and requirements under the program. (45 CFR 249.33(a)(6)(1976).)

The State has presented no evidence that the survey agency provided the single State agency with the notice required under the regulation, although the Board noted in its February 11 Order that without such a showing the Board could not find that the denial was inappropriate. Furthermore, the State has not shown that the required findings were made. Irrespective of such factors, however, the question remains whether the State court order overcomes the Federal regulatory requirements.

45 CFR 205.10(b)(3) makes FFP available for:

Payments of assistance within the scope of Federally aided public assistance programs made in accordance with a court order.

The Board concludes that but for the lack of a two-month extension, the payments here are "within the scope" of the Medicaid program. Accordingly under 45 CFR 205.10(b)(3), FFP is available for the period in question. (See also the discussion of §205.10(b)(3) in Ohio, supra, pp. 10-13.)

Conclusion

For the reasons stated above, the Board reverses the Agency's disallowances of FFP for services at Hillhaven during the period November 1 through December 31, 1976.

Department of Community Health and Medical Care (DCHMC)

Issue

The questions presented are (1) whether a certification and provider agreement based on standards for SNF services are sufficient for the State to claim and receive FFP for ICF services and (2) whether a surveyor's statement, made after the period in question, regarding a facility's compliance with conditions for participation is a sufficient basis for claiming FFP.

Facts

The parties agree that during the period in question, March 18, 1975 to March 31, 1977, the facility was not certified as an ICF. (See State's Appeal, April 4, 1979, p. 14; and Agency Response, p. 22.) The C&T for the following period, April 1, 1977 to March 31, 1978, notes certification for ICF services. (Agency Response, Exhibit 29.) Attached to this C&T was a statement dated April 12, 1977 by a hospital nursing consultant, regarding her survey of DCHMC during the earlier period. (Agency Response, Exhibit 30.) She stated that she surveyed DCHMC on January 4-5, 1977 and September 30 and October 1, 1975, that the "SNF/ICF" was in compliance with all Medicare-Medicaid conditions, and that the facility had certain specialists and written agreements with physicians. The "Statement of Deficiencies and Plans of Correction" forms prepared after the completion of the surveys or revisits in January, 1977, April 1976, and September and October 1975, make no reference to the facility's compliance with ICF standards, however. (Agency Response, Exhibit 31.)

By letter dated January 23, 1979 the Agency disallowed FFP for ICF services provided at DCHMC during the period March 18, 1975 through March 31, 1977.

Discussion

The State has argued without further explanation that SNF certification requirements encompass those for ICFs and, in fact, are more stringent. The State also has argued that it was merely an oversight that the facility was not properly certified, and the surveyor's April 12, 1977 statement "relates back" to cure the defect for the earlier period.

It is possible that prior to the period in question here SNF certification requirements may have overlapped with ICF requirements. On January 17, 1974, however, the Agency published regulations at 39 FR 2220, implementing section 4 of Public Law 92-223 which transferred ICF services to Title XIX. The regulations set forth distinct standards and conditions which had to be met for a facility to qualify as an ICF and the methods and procedures to be followed by States in certifying ICFs. To be qualified as an ICF, a facility had to meet the newly promulgated standards for ICF participation by March 18, 1975. (45 CFR 249.10(b)(15)(i)(E) and (ii)(A), and see 30 FR 2235 for effective date.)

Also on January 17, 1974, the Agency published 39 FR 2254, requiring separate ICF certifications and provider agreements. That regulation, effective February 19, 1974, requires that the single State agency, "prior to execution" of the provider agreement for ICF services, obtain certification from the State survey agency that the facility meets ICF standards. (45 CFR 249.33(a)(2).)

Under 1974 and subsequent regulations, certain criteria for SNF and ICF certification are different. (See generally 45 CFR 249.33(a)(1) and (2), 249.10(b)(4)(i), 249.10(b)(15) and 249.12 (1974) and 42 CFR 405.1101 (1977).) Although the State may be correct that SNF standards are generally more stringent than ICF standards, the State incorrectly asserts that SNF standards encompass ICF standards such that qualification as a SNF necessarily means qualification as an ICF.

The State argues, in effect, that the surveyor's statement fulfilled the certification requirements. That statement is deficient for several reasons. Under regulations in effect during the period in question, a certification was not complete until a determination was made on the results of the survey. (See Maryland Department of Health and Mental Hygiene, Decision No. 107, July 2, 1980.) There is no evidence here that the survey agency (as opposed to the consultant who conducted the survey) ever made a determination on the results of the survey, much less at the appropriate time. Moreover, even if the surveyor's statement could be viewed as the survey agency's determination, the statement does not contain the necessary information for proper

certification, e.g., period of certification is not specified. (See New Jersey Department of Human Services, Decision No. 137, December 1, 1980.) Furthermore, it is clear from the regulations and New Jersey, supra, that a certification entails the survey agency communicating information about the facility to the single State agency prior to execution of the provider agreement. That was absent here.

Conclusion

For the foregoing reasons, the Board upholds the disallowance of FFP for ICF services provided by DCHMC during the period March 18, 1975 to March 31, 1977.

Compton Hill Convalescent Center (Compton) (also referred to as Mercy Convalescent Center)

Issue

The primary question presented is whether the operation of a facility by a State agency as agent for a State court overrides Medicaid regulations such that the State is eligible for FFP without having certified, or entered into a provider agreement with the facility.

Facts

State surveys of Compton conducted in February, April, and May, 1978 revealed certain deficiencies. (See Agency Response, Exhibit 33.) A "Statement of Deficiencies and Plan of Correction" was formulated, but disapproved by the State on June 26, 1978. (Agency Response, Exhibit 33.)

The State notified the facility that its SNF and ICF certification and provider agreement, which expired on June 30, 1978, would not be renewed. (Agency Response, Exhibits 34 and 35.) The Circuit Court of the City of St. Louis assumed control over Compton on July 27, 1978 and appointed the Director of the Department of Social Services as its agent to manage Compton. On October 16, 1978, the Circuit Court terminated its jurisdiction over Compton and released the Director as its agent effective October 31, 1978.

The parties agree that no certification or provider agreement was in effect for the period July 1, 1978 through November 31, 1978. The facility was subsequently certified as an ICF for the period December 28, 1978 through June 30, 1979. (Agency Response, June 19, 1979, p. 3-5, and Exhibit 1.) The record contains a provider agreement for ICF services showing an effective date of December 1, 1978. (State's Appeal, April 12, 1979, pp. 8-9, State's Appeal, May 17, 1979, Exhibit C.)

By letters dated February 8, 1979, April 26, 1979, and April 14, 1980, the Agency disallowed FFP for the period July 1, 1978 through April 30, 1980, on grounds that the State did not have in effect the appropriate certifications and provider agreements to support its claims for FFP for services provided at the facility during that period. 3/

Discussion

The State has admitted that there was no certification or provider agreement with the facility for the period July 1, 1978 through November 31, 1978. (State's Appeal, May 17, 1979, p.6.) The State has argued, however, that because the State, through the Circuit Court and Director of the Department of Social Services, assumed control of the facility it was not sensible for the State to do what amounted to certifying itself and entering into a provider agreement with itself. The State has argued further that while technically there was no certification or provider agreement, the facility did meet all of the requirements for participation during the entire period it was operated by the State (July 27 through October 31, 1978) and was, therefore, certified and had a valid provider agreement for that period. The Agency has argued that the regulations do not provide for exceptions to certification and execution of a provider agreement when the State operates a nursing home.

Under the regulations, FFP in payments to a facility providing SNF and ICF services is available only if the facility has met all requirements for participation in the Medicaid program as evidenced by provider agreements. (See 42 CFR 442.30(a) (1978) and 42 CFR 449.10(b)(4)(i)(C) and (b)(15)(i)(E) (1977).) The execution of a provider agreement is contingent upon certification of the facility by the State survey agency. (See 42 CFR 442.12 (1978) and 45 CFR 449.33(a) (1977).) The survey agency is required to certify that the facility is in compliance with each condition of participation. (See 42 CFR 442.100 (1978) and 42 CFR 449.33(a)(4)(i) (1977).) In order for a State to obtain FFP, the execution of the provider agreement must be in accordance with Federal regulations. (See 42 CFR 442.12 (1978), and 45 CFR 449.33(a)(6) (1977).)

3/ In its February 11, 1981 Order the Board implied that the period for which services were disallowed was July 1, 1978 through November 31, 1978, whereas the period was actually July 1, 1978 through April 30, 1979. The disallowance letters gave notice to the State of the correct period involved.

The State argues that compliance with Federal standards is necessarily implied by State operation of the facility. Such an implication alone falls short of meeting the regulatory requirements, and there is no exception in the regulation to the above stated requirements for a facility operated by the head of a State agency as agent for a State court. The facility was decertified initially due to deficiencies and there is no evidence that, during the period the facility was operated by the State (July 27 - October 31), a proper plan of correction was implemented or that the deficiencies were corrected.^{4/} Accordingly, the Board upholds the disallowance for the period July 27 through October 31, 1978.

The State did not operate the facility during the period July 1 through July 27, 1978 or the period November 1, 1978 through November 31, 1978. The State admits that there were no certifications or provider agreements for those periods. Since certifications and provider agreements are prerequisites to FFP, the disallowances for services provided during these periods was appropriate.

The State has argued that it should receive FFP for services provided during December 1978, and presumably thereafter, on grounds that the facility was certified and had an ICF provider agreement effective December 1, 1978. The record shows, however, that the facility was certified effective December 28. Under the regulations a provider agreement is not effective prior to certification of the facility. (42 CFR 442.12(a) (1978) and 45 CFR 449.33(a)(2) (1977), and see Maryland, Decision No. 107, supra.) Accordingly, the ICF provider agreement here could not be effective prior to December 28, 1978, and the disallowance of FFP for SNF and ICF services provided up to that date was appropriate.

The record indicates that the disallowance of FFP for December 28, 1978 through April 30, 1979, was for SNF services only. (See disallowance letter dated April 14, 1980.)^{5/} The record contains no evidence of a

^{4/} See generally, New Jersey Department of Human Services, Decision No. 164, April 30, 1981.

^{5/} The disallowance letters do not specifically state whether during this period the disallowance was for SNF or ICF services, although the April 14, 1980 letter indicates that it was for SNF services. The Agency attorney implies that ICF disallowances after December 28 would be improper. (See Agency Response, dated June 19, 1979, p. 5.) If the State and Agency later determine that any amounts disallowed between December 28, 1978 and April 30, 1979 were for ICF services, the Agency should adjust the disallowance accordingly.

provider agreement or certification for SNF services in effect during this period, and the State has made no arguments or showing to the contrary. Accordingly, the Board upholds the disallowance for SNF services provided between December 28, 1978 and April 30, 1979.

Conclusion

Based on the foregoing, the Board upholds the disallowance of FFP for services provided by Compton during the period July 1, 1978 through April 30, 1979.

Summary

The Board upholds in part and reverses in part the disallowances in these cases as set forth in the conclusion section for each facility discussed above.

/s/ Norval D. (John) Settle

/s/ Donald F. Garrett

/s/ Cecilia Sparks Ford, Panel Chair

RELEVANT DATA

<u>Board Docket</u>	<u>HCFA Docket</u>	<u>Date of Disallowance</u>	<u>Appeal Date</u>	<u>Facility</u>	<u>Amount</u>	<u>Q.E. 1/</u>
79-16	MO/78/01/112	1/23/79	4/4/79	Victoria Hillhaven DCHMC	\$ 64,053	3/31/78
	MO/78/01/114	1/23/79	4/4/79	Victoria Hillhaven	\$377,380	3/31/77 6/30/77 9/30/77
79-53	MO/78/01/139	2/2/79	4/12/79	Victoria	\$134,590	6/30/78
79-54	MO/78/01/214	2/8/79	4/12/79	Victoria Compton	\$197,850	9/30/78
79-99	MO/79/01/008	4/26/79	5/17/79	Victoria Compton	\$205,717	12/31/78
80-80	MO/79/01/151	4/14/80	6/4/80	Victoria Compton	\$140,517	6/30/79 9/30/79
80-131	MO/79/01/198	7/18/80	9/4/80	Victoria	\$ 95,347	9/30/79 <u>2/</u>
81-9	MO/80/01/058	11/17/80	1/26/81	Victoria	\$ 25,567	12/30/79 3/31/80
81-45	MO/80/01/066	3/17/81	3/24/81	Hillhaven	\$ 16,175	12/31/78 3/31/79

1/ Q.E. = Claim submitted on expenditure report for quarter ending as shown.
2/ Not a duplication of amounts disallowed in 80-80-MO-HC for same quarter.